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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MEMPHIS, *et al.*,

Petitioners,

vs.

N.T. GREENE, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS OWENS, CROSS and BURSE

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does 42 U.S.C. §1982 apply to the decision of a municipality to close a through street to public traffic at the point along that street which separates an all-white subdivision — which is alleged to be benefited by the closure — from a predominantly black area allegedly disadvantaged by the action?

2. Did the Court of Appeals err in holding that, in light of the totality of the circumstances established below, the

closing of West Drive imposed upon black residents of Memphis a badge of slavery of the very sort which Congress intended to proscribe under 42 U.S.C. § 1982?

3. Is proof of racially discriminatory purpose an essential element of a claim under 42 U.S.C. § 1982?

4. Did the Court of Appeals err in its alternative holding that the closing of West Drive was undertaken with the intent of discriminating against blacks and therefore violated 42 U.S.C. § 1983 and the Fourteenth Amendment?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set out at Pet. Br. 2-3, this case also involves the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983, the texts of which are set out in Appendix A to this brief, *infra*.

STATEMENT OF THE CASE

A. *Factual Background and Administrative Proceedings.* Hein Park, a residential subdivision located in central Memphis, has been an exclusive area for whites since well before World War II. It is bordered on the west by the "handsomely landscaped" campus of Southwestern College; on the south by North Parkway, which forms the boundary of Memphis' major municipal park;[1] on the east by Trezevant Street, a major north-south thoroughfare; and on the north by Jackson Avenue, which is a major east-west artery (A. 167).[2] This lawsuit concerns West Drive, a "scenically beautiful" street which runs through Hein Park from Jackson Avenue to North Parkway (Tr. 63). West Drive is the natural southern extension of Springdale Street, which is an important north-south route serving the predominantly black community to the north of Jackson Avenue. Prior to the street closing which is the subject of this case, the bulk of the vehicular and pedestrian traffic using

[1] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 406 (1971).

[2] "A. ____" refers to the Appendix in this case; the trial transcript is cited herein as "Tr. ____" and trial exhibits are referred to as "Exh. ____."

West Drive was accounted for by blacks. This traffic apparently originated north of Jackson Avenue since, at the time of trial, West Drive property owners — like all Hein Park residents — were white (A. 174).

In 1970, an effort was made by residents of Hein Park to close four streets leading into the subdivision, thus blocking almost all public access to the area. The City of Memphis refused to do this, but noted that a major portion of the thorough traffic using subdivision streets could be eliminated by closing off West Drive at Jackson.[3] On July 9, 1973, picking up on this suggestion, the Hein Park Civic Association petitioned the Memphis and Shelby County Planning Commission to close West Drive at its intersection with Jackson "to curtail the use of subdivision streets for through traffic. . . ." (Exh. 13.) On August 24, 1973, apparently in response to objections by certain city departments, the application was modified to "alleviate objections to the closure due to excessive length of a Dead End street and inaccessibility to interior portions of the Hein Park Subdivision by Police, Fire & Sanitation vehicles" (Exh. 7).[4] Nevertheless, on October 4, 1973, this request was also rejected due to "unfavorable departmental recommendations" concerning the closure (Exh. 21).

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[3]The Hein Park street closing request was rejected in 1970 after objections by the police, fire, and sanitation departments. In addition, city officials noted that "there is a question as to City maintaining streets which are not fully open to the public" and "there also could be a question as to the City's authority to close these street entrances after the public has formerly enjoyed their use." The letter of rejection stated that these questions had not been referred to legal counsel since the proposal was otherwise unacceptable. (Exh. 14.)

[4]Robert M. Wilkinson, Deputy Director of Planning, had noted in a memorandum dated August 10, 1970 that "closure of West Drive would create a 'block' over 3200 feet long between Trezevant and University. This would be a very bad situation" (Exh. 14).

After the Civic Association sought reconsideration, the Planning Commission met with Hein Park residents[5] and on November 2 wrote to the city attorney that it had decided to recommend closure if two conditions were met (Exh. 4).[6] On January 29, 1974, the Memphis City Council voted in a public meeting to approve the street closing (Exh. 26, at 37-38).[7] It was the only time in the history of the city that a street previously used as a public thoroughfare was closed.

During its deliberations about West Drive, the council was informed specifically that the requested closing would mainly affect blacks and appeared — to most blacks and to at least some whites — to be an effort to maintain separation of historically segregated neighborhoods along racial lines. For example, the City Council members received a petition submitted by the predominantly black Shankman Hills Civic Club which stated that "this closing symbolizes in unmistakeable terms a white neighborhood shutting its door on

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[5]By letter dated October 24, 1973, the Planning Commission notified the President of the Civic Association that a public hearing would be scheduled for November 13, 1973 (Exh. 43). But the Commission decided to approve the closing before that date. The Director of Planning subsequently told the City Council that (without specifying any date) notices were sent to people *on West Drive* and a "lengthy public hearing at our Planning Commission" was held (Exh. 26, pp. 2-3). In fact, there was no "public" hearing (Tr. 27, 178-79).

[6]"(1) Applicant either pay relocation costs for existing Memphis Light, Gas & Water facilities *or* provide easements for existing and future utilities. (2) Fire Department will require a minimum of 24 feet of clearance with no obstructions other than the rolled curbing as submitted on the normal type of rolled speed breaker."

[7]The approval of the Council was reaffirmed on February 5, 1974 when a motion to reconsider was defeated (Exh. 27). A resolution to reopen West Drive was discussed on three occasions that spring (Exhs. 28-30). No action was taken. The matter was before the City Council for the last time on January 31, 1978 for correction of an error in the original resolution (Exh. 41).

its adjacent Black and integrated communities." Black witnesses, including the original plaintiff, N.T. Greene, expressed similar sentiments (Exh. 26, pp. 35-36; Exh. 30, at 6, 7-8). A councilman made reference to the "behind the scenes reasonings" for the street closing (Exh. 41, p. 17). And a white resident told the council of his Hein Park neighbors' reaction when he opposed the street closing: surprise at his support for the "niggers" (Exh. 30, at 1).[8] As described during the council hearings, the closing was to be accomplished by deeding a strip of land, 25 feet in depth and extending across West Drive at its intersection with Jackson Avenue, to the northernmost property owners on West Drive; and by erecting a physical barrier giving the appearance of a continuous curb along Jackson Avenue. Plantings extending part of the way from the shoulders toward the center of West Drive would provide further screening. A 24-foot gap punctuated by speed breakers would enable emergency vehicles to cross the strip (Exh. 26, pp. 16-17).[9]

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[8]The relevant portion of the testimony at the council meeting of March 5, 1974 (when the reopening of West Drive was considered) from this witness is as follows (Exh. 30, p. 1):

> But if you want me to, I will spell it out for you. Mr. Chairman, the answer is sitting right here. The well-to-do white people living in Hein Park do not want black people or the few of us who refuse to run away living north of Jackson to drive on — to drive on — what they think is their street. I phoned a man — I phoned a man with whom I have been friendly for more than 65 years. His wife answered and would not let me speak to him. So as the rights and wrongs were discussed, she said to me "Leo and I were surprised to see you sitting with that group of niggers." That, Mr. Chairman, is the issue here.

This witness died before the case came to trial after the Court of Appeals' remand. *See* Tr. 49.

[9]A barrier of somewhat different design is now in place. It consists of two parallel rolled curbs across the mouth of West Drive with several rows of plantings in between. The effect is not unlike railroad tracks filled in with dirt and rows of plants.

B. *Judicial Proceedings.* In 1974, this suit challenging the decision to close off West Drive was filed. Motions to dismiss the original and amended complaints were granted by the district court on October 4, 1974. Although that court did not specify the precise reason for its action, the Court of Appeals later observed that the dismissal must have been for failure to state a claim upon which relief can be granted, under F.R. CIV. P. 12(b)(6) (A. 38, n.1; *compare* A. 30-31).

The Court of Appeals reversed. Applying the principle that dismissals on the pleadings are not favored, the court ruled that the complaints, read together and

> . . . construed favorably to the pleader . . . reasonably aver that the closing confers certain benefits, to *wit,* the privacy and quiet of an exclusive dead-end street, on white residents of West Drive that the City has refused to confer on similarly situated black neighborhoods. So construed, those blacks allegedly denied such dead-end streets because of their race "hold" their "real property," on a less equal basis, than similarly situated whites who "hold" their "real property" subject to having the city confer the dead-end street benefit in their property.

(A. 40.)[10]

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[10]The Court of Appeals also held that the plaintiffs had alleged the elements of a §1983 claim against the Mayor and City Council Chairman even though they had not specifically sought to rely on that statute. The court then inserted the *dictum* that has spawned so much confusion in this case regarding the elements of a cause of action under the 1866 and 1871 Civil Rights Acts (A. 42-43):

> To establish a Section 1982 or 1983 claim on remand, Greene must prove his allegations that city officials conferred the closed street on West Drive residents because of their color; he must prove racial motivation, intent or purpose, in the absence of such egregious differential treatment as to in itself violate equal protection or, alternatively, to command an inference of racial motivation.

On remand, a motion to intervene as plaintiffs was filed by the Owens, Cross and Burse respondents on March 29, 1977, and granted on April 11, 1977. Intervenors alleged that the defendants had violated their rights under § 1982 in that the closing of West Drive at the north end would confer upon white residents of West Drive and Hein Park benefits not available to blacks living in adjoining and surrounding streets, for example, "increased property values, solitude, safety and better environmental quality in general" (A. 50, ¶ VI of complaint). A subsequent amended complaint filed on May 24, 1977 (A. 55) alleged that the affluent white residents of Hein Park, with the support and acquiescence of City officials, had sought to preserve the all-white nature of the subdivision and protect it from incursions by black residents into the area (A. 55). It further alleged that West Drive was "a direct and essential route of access to Snowden School, a public school, and the north entrance to Overton Park, a public park, and said way is traversed mainly by black youth and other blacks . . ." (A. 55-56).[11]

At the trial on February 13-14, 1972, plaintiffs presented unrebutted testimony that the West Drive closing would have adverse financial and social consequences for the black community to the north of Jackson Avenue. A realtor predicted that the action would result in increased property values for white owners in Hein Park while further depressing property values in black neighborhoods above Jackson Avenue. A sociologist linked the street closing to historic patterns of segregation and discrimination in Memphis and warned of the potential increases in aggressive

[11]The intervenors also sought class certification on behalf of "similarly situated black citizens seeking to enjoin the closing of West Drive to through traffic" (A. 49). On October 3, 1977, the district court certified a class in accordance with a stipulation filed by the parties on September 29, 1977 (A. 67).

behavior and vandalism which could result. Several plaintiffs related their desire to make use of the thoroughfare in their daily activities and their reactions to the proposal. In addition, the entire administrative record of proceedings before the Council and the Planning Commission was entered into the record. City officials defended the decision as a "nonracial" effort to accommodate the desires of residents; they also pointed to instances in the past when platted but unopened streets or alleys had been transferred to black businesses or churches upon request.

The district court refused to interfere with the street closing. Although he recognized that its effects would be felt overwhelmingly by blacks living north of Jackson Avenue, the district judge regarded himself limited by a very narrow reading of the Court of Appeals' prior *dictum* in the case (*see* note 10 *supra*). Plaintiffs had not prevailed, in this view, because they had not demonstrated racial motivation on the part of city officials, nor shown a significant departure from normal procedures for the benefit of the white Hein Park residents. (Since the West Drive action was the only closing of a street in prior public use in the city's history, the court felt that there was nothing to which to compare it, even though he rejected the city's argument that black neighborhoods received similar benefits when unopened streets or alleys were transferred.) This determination was reversed by the court below, which concluded from its review of the record that a violation of 42 U.S.C. § 1982 had been established.

The Court of Appeals clarified that it had not intended, in its first opinion, to set limits on the kind of evidence needed to establish a violation of § 1982. Although a refusal by the City to grant a similar application to blacks would have been one way to demonstrate a violation of the statute, the

plaintiffs were not foreclosed from establishing a violation by other evidence. The court concluded that the closing of West Drive under the unique circumstances disclosed by the record constituted a badge of slavery related to the plaintiffs' right to hold property on an equal basis as white citizens, thereby coming within the parameters of § 1982. The court also found the evidence sufficient to establish racial *animus* under the standards articulated by this Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

SUMMARY OF ARGUMENT

I.

The closing of West Drive under the circumstances of this case violated 42 U.S.C. § 1982. That statute declares in broad terms that all citizens shall have "the same right . . . as is enjoyed by white citizens . . . to . . . hold . . . real and personal property," and this Court has given it an expansive interpretation, as befits its broad remedial purpose to eradicate the badges and incidents of slavery. In applying the law, courts must consider the totality of the circumstances to determine whether a challenged action falls within the statutory proscription.

When the City's action in closing West Drive is considered in historical context, taking into consideration its immediate objective and ultimate effect, it is clear that the statute has been violated. Closing West Drive created a tangible as well as a psychological barrier between the white and black communities. Its effect was to benefit white residents of Hein Park but to depress property values in the

area north of Jackson Avenue. It served as a warning to blacks to stay out of the subdivision. Under these circumstances, the closing of the street adversely affected the ability of blacks to hold property on an equal basis with white citizens.

II.

The petitioners are wrong in suggesting that constitutional standards of proof are applicable in the present context. It is well settled that Congress may, under the enabling provisions of the post-Civil War amendments to the Constitution, establish more stringent standards than would be required by the amendments themselves.

There is no evidence that the 1866 Congress desired to limit the application of § 1982 solely tointentional discrimination. The language of the statute carries no such implication. Legislative history shows that Congress was concerned about facially neutral statutes — such as the vagrancy laws enacted as part of the Black Codes — that had a discriminatory impact on blacks.

The only Congressional discussion of intent focused on the penal provisions of § 2 of the 1866 Act. Proponents of the bill maintained that a requirement of proof of intent could be inferred from the fact that § 2 was a criminal provision. They made no reference to the bill's civil liability provisions and no similar implication can be drawn concerning § 1982, the civil redress section of the Act. And, none of this Court's prior cases involving § 1982 has interpreted the statute to require a showing of racial motivation.

III.

The Court of Appeals specifically reserved the question whether intent must ever be proved to establish a violation of § 1982. But it did address the issue whether plaintiffs had met their burden of proof under their alternative theory based on § 1983 and the Fourteenth Amendment. The evidence, taken as a whole, meets the standard of intentional discrimination set forth in *Washington v. Davis* and *Arlington Heights.*

ARGUMENT

I.

THE EVIDENCE PRESENTED TO THE DISTRICT COURT WAS SUFFICIENT TO ESTABLISH A VIOLATION OF 42 U.S.C. § 1982.

Although petitioners have attempted to characterize the action of the City of Memphis in closing off West Drive as nothing more than the legitimate exercise of its plenary authority over land use, in fact far more is involved in this case — as both the trial court and the Court of Appeals recognized. The majority below emphasized the relevant points of difference between the West Drive decision and routine zoning activities:

> . . . The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected

> precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influences which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominantly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humiliations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.

610 F.2d at 404.[12]

The Court of Appeals' analysis was entirely correct. As we show below, in appropriate circumstances (such as those involved here) a street closing may violate 42 U.S.C. § 1982 by restricting the "property rights" of residents of black

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[12]Similarly, the district court recognized that the street closing would have what it termed a "disproportionate impact on certain black citizens" (A. 161):

> As heretofore indicated, by placing the narrow barrier at the intersection of West Drive and Jackson, the southbound overwhelmingly black traffic will no longer be allowed to continue a logical and direct route across Jackson. At the same time the white residents of West Drive will have considerably less traffic. The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return.

neighborhoods. Further, the Court of Appeals appropriately assayed the city's action in light of historical conditions to determine its full significance.

A. 42 U.S.C. §1982 Encompasses the City's Action Blocking Access to West Drive.

Petitioners contend that this case is governed by *Palmer v. Thompson,* 403 U.S. 217 (1971) because the city's "action now before the Court can no more be said to be a 'badge or incident' of slavery than could the closing of the pools in *Palmer*" (Pet. Br. at 13). But as the court below recognized, the gravamen of this action is the asserted violation of 42 U.S.C. §1982, not a direct claim under the Thirteenth Amendment — the situation in *Palmer.*[13] 610 F.2d at 402 n.8.

Section 1982 is a remedial measure enacted pursuant to Congress' enforcement authority granted in §2 of the Thirteenth Amendment; and, as this Court has emphasized, it is to be "accord[ed] a sweep as broad as its language." *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437 (1968). In a variety of factual settings, this Court and the lower federal courts have, accordingly, taken an expansive view of the rights protected by §1982.[14]

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[13]In *Palmer,* Mr. Justice Black, for the Court, rejected an argument that a city's closing of public swimming pools had imposed a "badge of slavery" on its black citizens in violation of the Thirteenth Amendment. He stated that, absent applicable Congressional legislation, this Court lacked the "lawmaking power" to determine what conduct amounted to a "badge of slavery." 403 U.S. at 227.

[14]In Hurd v. Hodge, 334 U.S. 24 (1948), this Court rejected the claim that the statute prohibited only those actions affecting blacks which "wholly disabled them because of their race." It held enforcement of racially restrictive covenants invalid under the statute even though

(continued)

(footnote continued from preceding page)
blacks were not denied the general right to purchase or lease other property in the jurisdiction. *Jones, supra,* rescued the enactment from a century of desuetude by confirming its application to transactions between private parties, pursuant to the Thirteenth Amendment's broad commission to Congress to fashion legislation suitable for abolishing all the remaining incidents of slavery. *See* Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting).

In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), this Court interpreted the term "property" in § 1982 to include a membership share in recreational facilities which could be assigned to a tenant. In Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973), the statute was held to protect a black person's right to exercise an *option* to purchase a swim club membership to fill a vacancy created by the resignation of the individual from whom he had purchased his house, even though membership rights themselves could not be transferred between sellers and buyers.

The lower federal courts have continued to interpret § 1982 broadly, to expand the "elusive" concept of "property", Terry v. Elmwood Cemetery, 307 F. Supp. 369, 373 (N.D. Ala. 969). (Holding that a purchaser's interest in a burial lot is a property right, the *Terry* court quoted one definition from H. Cohen, FUNDAMENTALS OF LAND USE LAW ix (1962): "[A] 'property right' of any nature may be defined as "that type of relationship which is entitled to protection from a decision maker.' " 307 F. Supp. at 374.) In Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974), the court addressed an issue left unresolved in *Tillman,* and ruled that a black person invited by a swim club member to use the facilities of a swim club as the member's guest has enforceable "property" rights against discrimination under § 1982. As the court analyzed the issue,

> It is reasonable to characterize the freedom of blacks to go and come as guests of a swim club member as sufficiently pertaining to a condition of property to be a right capable of being held under § 1982.

495 F.2d at 1339. *See also,* Walker v. Pointer, 304 F. Supp. 56, 61-62 (N.D. Tex. 1969) (white tenants may not be evicted for entertaining black guests, under § 1982).

The reported decision which most closely parallels this case is *Jennings v. Patterson,* 488 F.2d 436 (5th Cir. 1974). There, private parties (with the acquiescence of city authorities) erected a barrier across a public road which prevented residents to the east of the blockade — who with one exception were black — from using the western portion of the street. The single white resident was given an easement across the barrier, but for the black residents "[w]ithout this access, one and a half to two miles are added to the journey to town." 488 F.2d at 439. The Court of Appeals reversed the district judge's ruling that there was no discrimination, finding that the blacks had been "denied the right to hold and enjoy their property on the same basis as white citizens." *Id.* at 442.

In the instant case, as in those described above, the plaintiffs' property rights are affected by the decision of the Memphis City Council to interpose a barrier between the white and black communities. There was unrebutted testimony, credited by both the district court and the Court of Appeals, that closing West Drive would increase property values on that street and depress values north of Jackson Avenue (*see* Tr. 45, 118-19). Moreover, by giving the property owners to whom the city transferred the 25-foot strip of West Drive the power to selectively bar black pedestrians from entering West Drive, the plaintiffs' right "to go and come at pleasure" is affected, *Bell v. Maryland,* 378 U.S. 226, 293 n.10 (1964) (Goldberg, J., concurring). And finally, by creating a white enclave, the city gave the white residents of West Drive a perceived benefit that has no comparable duplicate for black citizens residing in the area around Springdale Street. Because of residential segregation, the barrier serves as a constant reminder that blacks are not welcome on West Drive and in Hein Park.[15]

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[15]As the Court of Appeals put it, 610 F.2d at 404, the closing of West Drive was "an unmistakable warning to the black people living to the north of West Drive to stay out of the Hein Park subdivision."

Thus, the court below properly concluded that an isolated street closing which divides neighborhoods along racial lines, and which confers a benefit on the white community that is denied to the black community, violates the right of blacks to hold property on an equal basis as whites and therefore constitutes an incident of slavery that is within the Congressional power to prohibit under § 2 of the Thirteenth Amendment.

B. The Court of Appeals Correctly Considered All the Surrounding Facts and Circumstances in Reaching the Conclusion that the Closing of West Drive Violated § 1982.

As we have shown, under this Court's decisions there is no sharp dividing line between property-related interests which are or not vouchsafed to minority citizens under 42 U.S.C. § 1982.[16] In some circumstances, a street closing may violate the statute even though it might not transgress the Fourteenth Amendment's equal protection clause, just as the opportunity to attend a swim club may fall within the coverage of the law though arguably not within the scope of § 1 of the Thirteenth Amendment.[17] *See Palmer v. Thompson, supra.* The critical determination whether § 1982 has been violated requires a reviewing court to sift all the facts and circumstances in order to assess the challenged action

[16]It is likely that the rights of whites are also protected by § 1982. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

[17]In Argument II, *infra,* we explain why standards of proof developed in this Court's Fourteenth Amendment jurisprudence are inapposite in construing a remedial statute which is a valid exercise of Congressional authority under the Thirteenth Amendment. In Argument III, we demonstrate that the judgment below is correct even under Fourteenth Amendment principles.

"in terms of its 'immediate objective,' its 'ultimate effect' and its historical context and the conditions existing prior to its [occurrence].' " *Reitman v. Mulkey,* 397 U.S. 369, 373 (1967).[18] Judged in these terms, as it was by the Court of Appeals, the closing of West Drive clearly infringed the statute.

Although the "immediate objective" of the closure was described in the Civic Association's application as being "to curtail the use of subdivision streets for through traffic," there was evidence that suggested that the real reason for the closing was to bar entry to individuals (mostly black) residing north of Jackson Avenue (*see, e.g.,* A. 150; Exh. 30, p. 1; Exh. 41, p. 17; note 8 *supra*). The city had rejected less drastic alternatives that were available to ameliorate any heavy traffic flow on West Drive, such as speed breakers, posting a low speed limit, or closing the street during certain hours of the day. As several witnesses and councilmen pointed out during the hearings before the City Council (Exh. 26, pp. 21-22, 26; Exh. 27, p. 2; Exh. 41, p. 12), many residential areas of the city might like the luxury of a street closed to through traffic (Exh. 41, p. 17). It is therefore significant that the first and only instance in which the city closed a through street involved the erection of a barrier between white and black neighborhoods.

The "ultimate effect" of the city's action was extensively discussed by the witnesses, the district court, and the Court of Appeals. There is no dispute in this case that the primary adverse impact of closing West Drive at Jackson Avenue — inconvenience and delay in travelling to Overton Park, the Snowden public school, or other destinations to the south of the Springdale area — was visited almost exclusively upon

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[18] *Reitman* was a Fourteenth Amendment challenge to a provision of the California Constitution, but its approach is equally applicable to § 1982.

black citizens. As the district court found, "the southbound overwhelming black traffic will no longer be allowed to continue a logical and direct route across Jackson . . . . The residents of West Drive also will have less inconvenience because most of their movement will logically take them southbound on departure and northbound on return" (A. 44). The trial judge also recognized that the street closing along Jackson Avenue conveyed a vivid message to the black community to the north: "Obviously, the black people north of there who[*sic*] are being told to stay out of the subdivision" (Tr. 317).[19] Furthermore, by deeding the strip of land at the mouth of West Drive to the abutting landowners, the city would be giving them an absolute right to bar pedestrian, as well as vehicular, traffic.

Unrebutted testimony presented by the plaintiffs also established that, as a consequence of the closing, property values on West Drive would increase while those north of Jackson Avenue would depreciate.[20] Finally, the proof

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[19]During the trial, the district court described the West Drive closing as "unprecedented" and then said (A. 123-24):

> I don't think it is going to stand or fall except it is another indication that somebody decided they were going to accomplish, partially accomplish what they hadn't been able to do in three years; the Hein Park Civic Club. They tried to keep all of the people north of Jackson from coming through there and that didn't work. So, now somebody; I don't know who it was, has come up with this clever idea that if we can get the two people on the corner to — I would be interested to know who is going to pay the eight hundred dollars. If we can get those two people to agree and lend us their names, we can stop these people to the north.

[20]The district court did not find this evidence lacking in credibility:

> In the instant case, this federal court is of the opinion that it should refrain from applying its judgment on the merits *even though* the City Council opted for lessening the traffic problems for the white citizens of West Drive in spite of the adverse impact upon the black citizens north of Hein Park, the aggravation of racial hostility with the attendant retribution and vandalism caused by the obvious rejection, a reduction of response time for the fire and police and the inconvenience and delay to Sanitation Department employees" (A. 163) [emphasis supplied].

indicated that the likely consequence of closing the street would be increased racial hostility, vandalism, harassment of school children, and arrests by police. These results, of course, could be accomplished only with the assistance and participation of city authorities. *See Reitman v. Mulkey, supra,* 387 U.S. at 378-79.

Finally, the "historical context" of the West Drive closing supports a finding of discrimination. As previously indicated, Memphis had never before closed a street used by the public in order to deal with traffic congestion. Although city officials had themselves raised questions about the legality of such action when it was first proposed in 1970 *see* note 3 *supra*), no effort was made to resolve the issues before the decision to block West Drive was made. The city's normal practice was for the Planning Commission to obtain and consider comments on such matters as proposed street closings from all governmental departments. In this instance, the commission gave conditional approval to the closure without any reply from the city's Public Works Department (Exh. 26, at 2).[21] It also acted without conducting the public hearing which it had itself scheduled for November 13, 1973.[22] No official traffic impact study was undertaken in connection with the matter, and the city did

[21]During the City Council hearing on January 29, 1974, oblique reference was made to an internal memorandum from the public works department that apparently raised some objection (Exh. 26, pp. 3, 6). One councilwoman expressed surprise that the Planning Commission would reach a definite conclusion without some definite opinion from the affected government departments, and noted that "Public Works was not only involved in upkeep of the streets, but also covers a multitude of problems that deal with the condition in an area where people live" (Exh. 26, p. 4). A councilman volunteered the view that Public Works was concerned more about the "precedent as opposed to the merit of this particular matter" (Exh. 26, p. 4).

[22]*See* note 5, *supra,* and accompanying text.

not even have reliable current figures for the number of vehicles using West Drive (Exh. 26, pp. 33-34; 36-37).

Taken together, these facts and circumstances can leave no doubt about the discriminatory nature of the West Drive closure.[23]

The judgment below should be affirmed.

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[23]The Court of Appeals' summary of the salient considerations bears repeating:

> . . . The community to be benefited by the closing was and had historically been all white. Conversely, the territory to be burdened by the closing was predominantly black. The barrier was to be erected precisely at the point of separation of these neighborhoods and would undoubtedly have the effect of limiting contact between them. The proposed closing was not enacted in response to any uniform city planning effort, directed generally to the preservation of the residential neighborhoods throughout the city; instead it appears to have been a unique step to protect one neighborhood from outside influence which the residents considered to be "undesirable." Finally, there was some evidence, credited by the district court, of an economic depreciation in the property values in the predominatly black residential area with a corresponding increase in the property values in Hein Park. The result, under the unique circumstances here, can only be seen as one more of the many humilations which society has historically visited upon blacks. Where that racial humiliation not only rises to the level of a badge of slavery but also affects the right of blacks to hold property in the same manner as other citizens, then Section 1982 has been violated and the federal courts must provide a suitable remedy.

Although, as we have noted above, the district court drew many of the same conclusions about the procedures followed and the effects of closing West Drive, it reached the opposite result from the Court of Appeals. The trial court's opinion makes clear that this followed from that court's reading of the prior remand opinion of the Sixth Circuit (*see* A. 159), which articulated the same standards for proving a § 1982 or § 1983 claim; to wit, constitutional standards. Thus, the district court's entire legal analysis concerned the sufficiency of the proof to demonstrate a *constitutional* violation under the Fourteenth Amendment (see A. 159-63), followed by the conclusory statement that "the proof does not establish the entitlement of the plaintiffs to relief under 42 U.S.C. §§ 1982, 1983, nor any other federal statute or case authority" (A. 163)., As we explain in the next section, the Court of Appeals, in its second opinion in this case, properly construed § 1982 independently of any constitutional claim.

II.

PROOF OF RACIALLY DISCRIMINATORY PURPOSE OR INTENT IS NOT REQUIRED TO ESTABLISH A VIOLATION OF 42 U.S.C. § 1982.

Petitioners seek to avoid the force of plaintiffs' evidentiary showing (which was credited by the Court of Appeals) by arguing that this Court should import into § 1982 principles of constitutional jurisprudence developed in Fourteenth Amendment suits which require proof of a specific intent to discriminate in order to establish a violation.[24] This issue was specifically reserved by the Court of Appeals; and we continue to maintain, as we did in our opposition to the petition for a writ of certiorari, that it is not properly raised in this case.[25]

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[24]*See* Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). Petitioners also rely upon City of Mobile v. Bolden, 64 L. Ed. 2d 47 (1980); however, it seems clear that the plurality opinion's discussion of an intent requirement under the Fifteenth Amendment was *dictum* in light of the categorical statement that

> [h]aving found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that appellants ['at-large system of elections] invaded the protection of that Amendment in the present case. (64 L. Ed. 2d at 57.)

[25]The district court made an attempt to apply Fourteenth Amendment principles and concluded that the evidence did not support a finding of racial motivation (*see* note 23 *supra*). However, as the Court of Appeals pointed out, the trial judge's analysis was hobbled by his belief

> that he conceived himself limited in his capability to grant relief by the language in *Greene I* and that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment.

(continued)

Since the Court has granted review, however, we show in this section that the cases cited by petitioners do not control the *statutory interpretation* question in this matter; that neither the language of § 1982, its legislative history, prior decisions, nor underlying public policy considerations require a showing of purposeful discrimination in order to establish a violation of the statute.

(footnote continued from preceding page)

A. 180. *Compare* colloquy at A. 124-25:

> The Court: . . .
>
> Now, the problem is we have got to try to fit it in with what the Court of Appeals says the law is. And I agree with one of the points you are making, that how in the world am I going to compare the only time it has ever happened whether they [323] doing it for blacks or whites.
>
> Mr. Speros: Well, Your Honor, we can't make cases. I mean we had to go to the files and find out what have we done in black neighborhoods. . . .
>
> The Court: I don't think that you can compare the closing of a part of an alley in an all black neighborhood to a situation where an all white neighborhood is seeking to stop the traffic from an overwhelmingly black neighborhood from coming through their street.

For this reason, the Sixth Circuit quite evidently felt that the district court's finding that racial motivation had not been proved — if the issue were considered dispositive — was not entitled to any deference, *see* A. 186, n.13. This is the clear meaning of the majority opinion's statement, following its summary of the evidence, that

> [t]he foregoing citations from the record can only be reconciled with the court's ultimate decision by concluding that the judge believed himself limited in his inquiry on remand to determining whether the proofs showed that in closing West Drive to reduce noise and traffic, the City of Memphis had conferred upon the white residents of West Drive a benefit that it had refused to black citizens when they had applied for similar relief.

(A. 177) (emphasis supplied). In the following section of the brief, we show that the Court of Appeals' view of the adequacy of the proof to establish racial intent was correct.

A. The Requirements for Demonstrating a Constitutional Violation Under the Fourteenth Amendment Do Not Govern Suits Under 42 U.S.C. § 1982.

The petitioners urge the Court to apply the approach of *Washington v. Davis,* 426 U.S. 229 (1976) and *City of Mobile v. Bolden,* 64 L. Ed. 2d 47 (1980) to this § 1982 claim, and to reverse the judgment below because the Court of Appeals did not hold discriminatory intent must be proved to make out a violation of § 1982. The short answer to this argument is that *Washington v. Davis, supra,* holds, and *City of Mobile v. Bolden, supra,* suggests (*see* note 24 *supra*), only that intent must be proven to establish a constitutional violation under the Fourteenth and Fifteenth Amendments, respectively.[26] The case at hand involves a *statutory* cause of action.

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[26]The logic of Washington v. Davis' reading of the Fourteenth Amendment equal protection clause, we respectfully suggest, does not compel a similar interpretation of the Thirteenth Amendment. The Fourteenth Amendment subjects all legislative and administrative classifications to potential judicial scrutiny; the Thirteenth Amendment is limited in its scope to the "badges and incidents of slavery". For this reason, a determination that the Thirteenth Amendment does not require a showing of discriminatory intent to invalidate an act which perpetuates the status or incidents of servitude could hardly be said to "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Washington v. Davis, *supra,* 426 U.S. at 248 [footnote omitted]. *See Developments in the Law — Section 1981,* 15 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 29, 183-84 (1980). But even if the Thirteenth Amendment does require a showing of intent, that would not resolve the instant case. For, we repeat, plaintiffs' claim here is brought pursuant to § 1982, a statute passed pursuant to the enforcement power granted Congress by § 2 of the Thirteenth Amendment.

It is now well settled that, in carrying out its legislative authority under the Reconstruction Amendments, Congress may establish more stringent standards than the language of the Amendments themselves would require. For example, on the same day that the plurality in *City of Mobile v. Bolden, supra,* suggested the inappropriateness of an "effects" test under the Fifteenth Amendment, this Court upheld the same standard in § 5 of the Voting Rights Act of 1965, which was enacted pursuant to § 2 of the Fifteenth Amendment. *City of Rome v. United States,* 64 L. Ed. 2d 119 (1980). *Compare, e.g., Washington v. Davis, supra,* with, *e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Nothing in the language of the Thirteenth Amendment suggests that Congress' authority to define the "badges and incidents of slavery" through remedial legislation is any more limited than its remedial powers under the Fourteenth and Fifteenth Amendments.

Indeed, Congressional authority under the Thirteenth Amendment to make discriminatory actions illegal without the necessity of showing intent has been recognized and sustained by the lower federal courts, in cases involving application of the Fair Housing Act of 1968, 42 U.S.C. § § 3601 *et seq.* (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81).[27] The dispositive question in this case, therefore, is whether a "discriminatory intent" requirement can be gleaned from the language and history of the statute in question, 42 U.S.C. § 1982.

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[27]Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied sub nom.* Whitman Area Improvement Council v. Resident Advisor Bd., 435 U.S. 908 (1978); Fox v. HUD, 468 F. Supp. 907 (E.D. Pa. 1979); United States v. Reece, 457 F. Supp. 43 (D. Mont. 1978); United States v. L&H Land Corp., Inc., 407 F. Supp. 576 (D. Fla. 1976).

B. The Plain Language of § 1982 Includes No Requirement for a Showing of Racial Intent.

To paraphrase this Court's comment when interpreting another remedial, civil rights law, "the objective of Congress in the enactment of [§ 1982, as contained in § 1 of the Civil Rights Act of 1866] is plain from the language of the statute."[28] It was to ensure to all citizens "the same right, in every state and territory in the United States . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens . . . ." Nothing in this broad phrasing suggests that racial *animus* need be shown to bring its protections into force, and this Court has consistently declined to read qualifications, additional requirements, or exemptions contained in other legislation into the 1866 Act.[29]

The statute was designed to uproot the institution of slavery, and to eradicate its badges and incidents. *See Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 422-37; *Tillman v. Wheaton-Haven Recreation Ass'n, supra*, 410 U.S. at 439. Congress acted to ensure that all persons, black and white, would be afforded equal opportunities to secure those rights which the framers deemed fundamental to a civilized society, and which they enumerated in the statute. *McDonald v. Santa Fe Trail Transp. Co., supra.* It is the

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[28]Griggs v. Duke Power Co., *supra,* 401 U.S. at 429-30.

[29]Thus, for example, in Jones v. Alfred H. Mayer Co., *supra*, this Court emphasized that § 1982 is not just an elderly progenitor of the Fair Housing title of the Civil Rights Act of 1968. The coverage of § 1982, . . . is markedly different from that of the Civil Rights Act of 1968." 392 U.S. at 417 n.21. While it is clear the the two statutes share some of the same goals, § 1982 is broad and general, whereas Title VIII is specific and directed.

condition of having lesser rights and opportunities to enjoy real and personal property than those "enjoyed by white citizens" which demonstrates a violation of the statute.

In *Jones, supra,* this Court held that the statute was "cast in sweeping terms", 392 U.S. at 422, and that it should be given a "sweep as broad as its language", *id.* at 437. It has rejected attempts to alter the plain meaning of the broad language through "ingenious analytical" arguments, *id.*, or through a stilted and "mechanical reading" of its language, *McDonald v. Santa Fe Trail Transp. Co., supra,* 427 U.S. at 287. These precedents compel rejection of the petitioners' argument in this case.

C. The Legislative History of the Civil Rights Act of 1866 Supports a Broad Reading, Unrestricted by an Intent Requirement, of the Civil Provisions of the Statute.

It would be unrealistic to examine the legislative history of the Civil Rights Act of 1866 for discussion of disparate-impact analysis similar to this Court's opinion in *Griggs v. Duke Power Co., supra.*[30] There are strong indications in the legislative history of the 1866 Act, however, that a broad reading of the statute is more in harmony with the intent of Congress than a restriction of its reach to acts of purposeful discrimination.[31]

[30]Note, *Racially Disproportionate Impact of Facially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?,* 1977 DUKE L.J. 1267, 1280; *Developments in the Law — Section 1981, supra,* 15 HARV. CIV. RIGHTS-CIV. LIB. L. REV. at 48-49, 68-69, 177. *See* City of Mobile v. Bolden, *supra,* 64 L. Ed. 2d at 98 n.27 (Marshall, J., dissenting).

[31]Such indications are of particular importance in construing statutes of this period, because a contemporaneous doctrine of statutory con-

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(1) Direct evidence that Congress did not intend to limit the civil provisions of the statute by an intent requirement

The strongest indication that Congress did not wish to limit the reach of the 1866 Act by incorporating an intent standard arose in the course of debate on the effect of the statute on the "Black Codes" adopted by Southern legis-

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(footnote continued from preceding page)
struction held that the words and original application of a statute did not necessarily limit its effect. Like a judicial precedent, a statute was considered as being, to some extent, capable of growth under the demands of a changed situation, so that it would continue to serve its original purposes. This Court recognized the doctrine of "the equity of the statute" in United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845), but cautioned that there should not be "an equitable construction of statutes beyond the just application of adjudicated cases." In Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 504 (1871), this Court held that "severe and literal" constructions should be avoided, and continued:

> A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law maker constitutes the law.

See also Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892), quoted in United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979); Landis, *Statutes and the Sources of Law,* in HARVARD LEGAL ESSAYS 213 (1934). Whatever may be the current force of this doctrine, see, e.g., Pope v. Atlantic Coast Line R. Co.,. 345 U.S. 379, 390 (1953) (Frankfurter, J., dissenting), it was undeniably accepted in the late 1860's, and the Thirty-Ninth Congress must be considered — absent persuasive evidence in the legislative history of the 1866 Act to the contrary — to have framed the Act under the assumption that its interpretation would not be limited to the specific situations then facing the nation, but was capable of growth to meet new situations. *See* Note, *supra,* 1977 DUKE L.J. at 1284-88. If there is no adequate direct evidence as to an intent requirement, therefore, the inquiry must shift to the identification of the primary purpose of Congress. If that purpose was to secure a practical result, this would indicate an intention that the reach of the statute be capable of growth sufficient to accomplish that result.

latures after the end of the war.[32] The Congress desired to enact into positive law, in the statute, the military orders disapproving those codes. Many provisions of the Black Codes were not discriminatory on their face; some went so far as to guarantee blacks the right to own property.[33] The evils Congress sought to redress in relation to these codes were of two kinds: the explicit racial discrimination in some provisions of the codes,[34] and also the racially disparate operation of certain harsh but facially neutral provisions such as the vagrancy and apprenticeship laws. These latter provisions applied to blacks and whites alike,[35] but harmed

[32]Within three months after the adoption of the Thirteenth Amendment in December, 1865 (and during the period when the Civil Rights Act was under consideration by the Congress), every Confederate state except Texas enacted a Black Code. *See* 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE 117, 1226-28 (1971). Many members of Congress believed that the enactment of the "Black Codes" throughout the South in 1865 and 1866 threatened to nullify the Thirteenth Amendment.

[33]R. Kohl, The Civil Rights Act of 1866, Its Hour Come Round at Last, 55 VA. L. REV. 272, 276-78 (1969). The Black Codes were collected in 1 S. EXEC. DOC. NO. 6, 39th Cong., 2d Sess. 170-230 (1866).

[34]It appears that only Mississippi and certain localities within Louisiana expressly prohibited blacks from owning real property. E. McPHERSON, POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 31 (1871) (Mississippi); 1 W. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279 (1906) (Parish of St. Landry, Louisiana); W. FLEMING, DOCUMENTS RELATING TO RECONSTRUCTION 31 (1904) (Opelousas, Louisiana).

[35]1 S. EXEC. DOC. NO. 6, *supra* n.33, at 170-71 (Alabama, Act of December 15, 1865 concerning vagrants or vagrancy), 180-81 (Georgia, Act of March 17, 1866 in relation to apprentices), 181-83 (Louisiana, Act regulating labor contracts for agricultural pursuits, not

(continued)

blacks to a much greater extent than whites because of the private actions of whites in refusing to sell land to blacks or to employ blacks at a fair wage.[36]

The provisions of the Virginia vagrancy law are an excellent case in point. On its face, the statute applied to both blacks and whites, and defined as vagrants the members of either race who were beggars, or who had no visible means of support, or who, "not having wherewith to maintain themselves and their families, . . . live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place there they then are." Vagrants of both races were subject to arrest and to a warrant ordering them "to be employed in labor for any term not exceeding three months . . . for the best wages that can be procured . . . to be applied . . . for the use of the vagrant or his family."[37] Nine days after its enactment, Major General A.H. Terry, the Commander of the Department of Virginia, issued an order prohibiting the enforcement of this vagrancy law because, regardless of the intent of the legislature, private actions would make its actual operation

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then signed by the Governor), 184-85 (Louisiana, Act of December 20, 1865 for the punishment of vagrancy), 186 (Louisiana Act of December 21, 1865 in relation to apprentices and indentured servants), 218-19 (South Carolina, § § 95-99 of the Act of December 21, 1865, relating to vagrancy), 229-30 (Virginia, Act of January 15, 1866 providing for the punishment of vagrants). As will be seen hereafter, the provisions of the Black Codes were discussed frequently in the debates on the 1866 Act.

[36]Part II, REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. 55, 83, 235-36 (1866); Part II, *id.* at 9, 22, 36, 71; Part IV, *id.* at 56, 69, 82, 117; REPORT OF GENERAL CARL SCHURZ, 1 S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 22, 24-25, 82 (1865), R. Kohl, *supra* n.33 at 279-83.

[37]The complete provisions of the Virginia Act of January 15, 1866, entitled "An Act Providing for the Punishment of Vagrants", are set out in Appendix B to this Brief, *infra*.

more onerous for blacks than for whites.[38] E. McPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 42 (1871). The President refused to disapprove this Order. *Id.*

This was not an isolated occurrence. In South Carolina, Major General D.E. Sickles ordered on January 17, 1866 that the only vagrancy laws that could be enforced in the state were those "applicable to free white persons", and ordered further that even these laws, made racially neutral by his order, "shall not be considered applicable to persons who are without employment, if they shall prove that they have been unable to obtain employment, after diligent efforts to do so." Order of January 17, 1866, ¶ XIII, quoted in E. McPHERSON, *supra,* at 37. Orders quashing state laws were also issued by General Swayne in Alabama and by General Thomas in Mississippi.

In the debates on the 1866 Act, these Orders were frequently discussed and approved. Several members of Congress stated their view that the provisions of these Orders would be continued by the provisions of the Act, and would thus both survive the end of military government in the South and be made applicable nationally.[39]

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[38]The pertinent portion of General Terry's Order is set out in Appendix C to this Brief, *infra*.

[39]Senator Wilson described the facially neutral Virginia vagrancy law as having been "used to make slaves of men whom we have made free." He thanked General Terry for his Order, and described the state laws set aside by military order as "nearly as iniquitous as the old slave codes that darkened the legislation of other days." He thought passage of the civil rights bill was required in order to bar such state laws forever. CONG. GLOBE, 39th Cong., 1st Sess. 603 (1866) [hereafter, CONG. GLOBE]. In the debate on initial passage, Senator Trumbull, the manager of the bill, stated that one of its purposes was to destroy all the discriminations of the Black Codes. CONG. GLOBE 474. In the debate

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If Congress or the military had wanted to restrict their actions to purposeful discrimination, they could have stopped with outlawing the private combinations of employers that manipulated the vagrancy laws to bear more heavily on blacks than on whites. Both Congress and the military understood that they were going further, however, to prohibit the enforcement of these facially neutral laws.

Further indication of the intent of Congress is provided by the debate on §2 of the Civil Rights Act of 1866, 14 Stat. 27[40] — the penal enforcement provision. The only dis-

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onpassage of the bill over the President's veto, Senator Trumbull quoted General Terry's statement that the Virginia vagrancy law would have the effect of "[reducing] the freedmen to a condition of servitude worse than that from which they have been emancipated", and cited the orders issued by Generals Terry and Sickles as demonstrating the existence of the evils — denied by the President — that the bill was intended to redress. CONG. GLOBE 1759, 1760.

The House debate was equally clear. Representative Cook cited the vagrancy laws and the orders of Generals Thomas, Swayne, Sickles and Terry, and continued:

> ... The question is, shall we leave these men in this condition? It is idle to say we are not leaving them to a system of slavery. If it had not been for the acts ofthe military commanders, had not the laws which have already been enacted by the Legislatures of the rebel States been set aside, the negroes would all have been slaves now under the operation of their vagrant acts or other laws.
>
> I believe that this bill is a proper remedy for these evils. ...

CONG. GLOBE 1124. Representative Thayer cited the Black Codes, and the military orders prohibiting their enforcement in Mississippi, Alabama, South Carolina, and Virginia, as demonstrating that the Thirteenth Amendment would be "of no force or effect whatever" if the bill were not enacted. CONG. GLOBE 1153. Representative Windom endorsed General Terry's order setting aside the Virginia vagrancy law, and said that the bill would accomplish the same end. CONG. GLOBE 1158. Representative Broomall took the same position. CONG. GLOBE 1263.

[40]Sec. 2 of the Civil Rights Act of 1866 has evolved into 18 U.S.C. §242. *Jones, supra,* 392 U.S. at 424 n.32.

cussion of "intent" by the Congress during consideration of the Act was in reference to § 2. It was occasioned by the claim of opponents of the bill that § 2 would authorize the arrest of a state judge for following in good faith the provisions of a state constitution or of state laws which were subsequently found to be inconsistent with the bill.[41] The proponents of the legislation responded by stating that the requirement of unlawful intent could be inferred from the fact that § 2 was a penal provision, and that there was therefore no need to add an intent requirement to this section of the statute.[42] If any other provision of the statute had been considered by its proponents to require intent, they would surely have pointed it out rather than rely on an argument by

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[41] *E.g.*, CONG. GLOBE 475 (remarks of Senator Cowan).

[42] "[I]t requires a union of act and intention to commit a crime," CONG. GLOBE 475 (remarks of Senator Trumbull); "I suppose the esence of all crimes consists in the intention, the purpose. In the trial of criminal cases, we inquire into the *animus* with which the act was done by the accused . . .," CONG. GLOBE 502 (discussion of culpability for treason) (remarks of Senator Howard); "Sir, what is a crime? It is a violation of some public law, to constitute which there must be an act and a vicious will in doing the act . . . and a judge who acted innocently, and not viciously or oppressively, would never be convicted under this act," CONG. GLOBE 1758 (remarks of Senator Trumbull). Representative Wilson stated in the House that "there are two legal modes of meeting any and every willful deprivation of these rights: one by action for damages at common law in the courts, which, however, will not lie against judicial officers; and the other by making it a penal offense, as the second section of this bill does. . . ."CONG. GLOBE 1836. Nothing in his remarks indicates that he intended to limit civil remedies under the statute to cases of willful violations, or that he ever addressed the precise reach of the civil provisions of the bill, as distinct from the criminal provisions. No other Representative or Senator discussed a limitation of the civil provisions in a manner corresponding to the limitation of the criminal provisions.

implication.[43] Rather than supporting the petitioners' argument, set forth at p. 25 of their brief, that "even the proponents of the Act of 1866 did not conceive that the bill would remedy unintentionally discriminatory laws . . . ," the debate on this point expressly refutes it. The reference to Senator Trumbull's remarks, mistakenly cited by the petitioners to page 477 of the Congressional Globe, is taken out of context.[44]

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[43]This Court has previously held that the scope of § 2 is substantially narrower than that of § 1, Jones v. Alfred H. Mayer Co., *supra*, 392 U.S. at 425 n.33, and that the latter was intended to provide a civil remedy, *see* Runyon v. McCrary, 427 U.S. 160 (1976). This function of § 1 was equally clear at the time of its passage, for Section 3 of the Act, 14 Stat. 27, contemplated that civil suits would be brought in state courts to enforce the rights granted by the Act — no grant of general Federal-question jurisdiction having yet been made to U.S. District and Circuit Courts — and provided jurisdiction in the U.S. Circuit Court where such rights could not be enforced in state or local courts. The earliest application of this right of civil enforcement was in In re Turner, Fed. Cas. No. 14,247 (Cir. Ct. D. Md. 1867). There, Chief Justice Chase, sitting as Circuit Justice, ordered the discharge, on a writ of habeas corpus, of a black child who had been indentured as an apprentice under the terms of a Maryland law which did not provide the same terms of indenture for black apprentices as a different law provided for whites.

In the debate, Senator Hendricks objected that the bill would create a civil remedy for damages, CONG. GLOBE 601, and Senator Cowan objected that § 1 would enable the U.S. courts to expand their jurisdiction, CONG. GLOBE 1782-83. No one disagreed with these propositions. *See also* the remarks of Representative Wilson, *supra* note 42.

[44]It is true that, during the debates, Senator Trumbull sought to downplay the effect that passage of the bill would have on the northern states, for example declaring that the bill "will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race." CONG. GLOBE 476. In fact, after President Johnson vetoed the bill, Trumbull stated, in the context of § 2, that the bill would have no application in any state where a "colored person . . . has adequate remedies in the state courts" for an "offense"

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(2) Indirect evidence that Congress did not intend to limit the civil provisions of the statute by an intent requirement

There is strong evidence that the framers of the 1866 Act wanted the rights they declared to be capable of growth, so as to continue to accomplish their purposes under the demands of different situations. Senator Trumbull openly admitted that he did not know the exact dividing line between slavery and the liberty protected by the Thirteenth Amendment, but that he wanted to give the greatest possible practical effect to the policy declared in the Thirteenth Amendment. CONG. GLOBE 474. He went on to state that "it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins," but that the Black Codes passed that dividing line wherever it was. CONG. GLOBE 475. Time and again, the bill's proponents stressed that their aim was "practical", geared to a particular result.[45]

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against him — while seeking votes to override the veto. CONG. GLOBE 1758. These and similar remarks have never been literally construed by this Court. In Jones v. Alfred H. Mayer Co., *supra,* the Court rejected the suggestion of Justice Harlan's dissent that they constituted the "plainest possible statement" that the bill was not intended to cover purely private action. *See* 392 U.S. at 459-60 (Harlan, J., dissenting). The Court also correctly observed that Senator Trumbull could not have meant that the Act would apply only to the states "whose laws did not themselves discriminate against Negroes", since it expressly provided that it would be effective "in every state and territory in the United States." 392 U.S. at 426 n.35. Finally, if the availability of adequate remedies in state courts were the standard, then one would suppose that both § § 1981 and 1982 would be dead letters today. Yet this Court has reaffirmed their full vitality in Jones v. Alfred H. Mayer Co., *supra*, and Runyon v. McCrary, *supra* n.43.

[45]Senator Trumbull stated that the bill would secure "freedom in fact". CONG. GLOBE 476. Representative Thayer stated that the bill was to

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To restrict the scope of §1982 to purposeful acts of discrimination would be inconsistent with the broad practical purposes of Congress in enacting the 1866 Act. An intent requirement can readily be harmonized with the goal of ensuring the neutrality of government processes, towards which the Fourteenth Amendment's equal protection clause was later directed. However, the Civil Rights Act of 1866 was directed towards achieving the *practical result* of equality, not towards ensuring a neutral process. The purpose of the Act would be thwarted, and the equity of the statute violated, if it were construed in the manner suggested by petitioners.

D. This Court's Decisions Under §1982 Have Not Required a Showing of Purpose.

This Court's previous interpretations of §1982 have always proceeded from an initial recognition that the

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give the Thirteenth Amendment "practical effect and force". CONG. GLOBE 1151. He continued (*id.* at 1152):

> The bill under consideration is intended only to carry into practical effect the amendment of the Constitution. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed; not only that that feature of slavery shall be abolished which permitted the purchase and sale of men, of women and of little children as slaves, but that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.
>
> To put any other construction upon this great amendment of the Constitution is to deprive it of its vital force, or its effective value. It is to cheat the world by sounding phrases; and while you pretend to give liberty to those who were in bondage, to leave them in reality in a condition of modified slavery, subject to the old injustice and the old tyranny which characterized their former unhappy condition.

Thirteenth Amendment was enacted specifically to extripate the "badges and incidents" of slavery. The Court has given a broad construction to the statute because "this amendment denounces a status or condition, irrespective of the manner or authority by which it is created," *Clyatt v. United States, 97 U.S. 207, 216 (1905). Thus, Bailey v. Alabama,* 219 U.S. 219 (1911), struck down a statute, neutral on its face, which imposed criminal penalties on persons who accepted money from an employer and then failed to fulfill the employment contract. The opinion explained:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question. *Henderson v. New York* [*Henderson v. Wickham*], 92 U.S. p. 268, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; . . . .

219 U.S. at 244-45. *See also, Pollock v. Williams,* 322 U.S. 4, 25 (1944); *Taylor v. Georgia,* 315 U.S. 25, 29 (1942); *Anderson v. Ellington,* 300 F. Supp. 789 (M.D. Tenn. 1969) (three-judge court).

The Court has both construed § 1982 consistently with its Thirteenth Amendment origins and also sustained Congress' power " 'rationally to determine what are the badges and the incidents of slavery, and [its] authority to translate that determination into effective legislation.' " *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 440, quoted in *Griffin v. Breckenridge,* 403 U.S. 88, 105 (1971).[46] And, as

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[46]*Griffin* is instructive on the issue in this case. There, the Court upheld the constitutionality of § 1985(3) under the Thirteenth Amendment, and its applicability to private parties. A claim under § 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," 403 U.S. at 102, but this follows from the statutory language itself:

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we have suggested above (II.A.), the Court has not felt compelled to bring Fourteenth Amendment concerns into cases involving Thirteenth Amendment statutes.[47] In *District of Columbia v. Carter,* 409 U.S. 418 (1973), for example, the Court observed that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources," *id.* at 423,[48] and declared that §1982 was an " 'absolute' bar to . . . discrimination, private as well as public. . . ." *Id.* at 422. In none of its rulings has this Court required a showing of racial

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> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, *for the purpose of* depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, ...

(Emphasis supplied.) Section 1982 contains no equivalent language. Clearly, where Congress intends that invidiously discriminatory motivation should be an element of a claim, nothing in the Thirteenth Amendment forbids it.

[47]It is true that §1982 was re-enacted as part of the Civil Rights Act of 1870, under the Fourteenth Amendment. But it is now well settled that Congress did not intend to repeal §1 of the 1866 Act when it enacted §16 of the 1870 Act pursuant to the Fourteenth Amendment. Runyon v. McCrary, *supra,* 427 U.S. at 168 n.8, 170-72. This reaffirmation that §1982 has its roots in the Thirteenth Amendment proved critical in determining whether a right of action could be maintained against a private party undr §1982, because the Fourteenth Amendment proscribes only discriminatory actions taken under color of state law. Johnson v. Railway Express Co., 421 U.S. 454 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., *supra,* 410 U.S. at 439-40; *cf.* Jones v. Alfred H. Mayer Co., *supra,* 392 U.S. at 424-30. By the same reasoning, the ruling in Washington v. Davis, *supra,* that racial motivation is an essential element of proof under the Fourteenth Amendment does not dictate the same result undr §1982.

[48]Quoting from Monroe v. Pape, 365 U.S. 167, 205-06 (1961) (Frankfurter, J., concurring and dissenting).

motive under §1982, and the lower federal courts have followed the same approach.[49]

Petitioners rely upon two instances in which this Court's opinion in *Jones v. Alfred H. Mayer Co., supra,* used the words "racially motivated".[50] *See* Pet. Br. at 25. Since the Court in both instances was merely characterizing arguments and concessions made in the briefs of the parties in that action, this language cannot even be regarded as rising to the level of *dictum.* Even if taken at face value, the phrases are simply descriptive of the case at hand — where racial *animus* was not in dispute.[51] In *Jones,* the focus was on

[49]E.g., Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied,* 419 U.S. 1070 (1974) (§1982 forbids housing developers from charging higher prices for similar housing in black areas of the city than in white areas where segregated housing patterns result from racial prejudice); Rhode Island Chapter, Associated Gen'l Contractors v. Kreps, 450 F. Supp. 338, 363 (D.R.I. 1978) ("... §1982, the twin of §1981, *see Tillman v. Wheaton-Haven Recreation Ass'n, Inc.,* 410 U.S. at 439-40, 93 S..Ct. 1090, has been held to forbid more than intentional discrimination. It looks behind a legal and formal equality to guarantee that black persons are in fact receiving equal treatment").

[50]The first statement was in the context of rejecting the respondents' argument that a literal reading of the statute would have far-reaching implications that Congress could not have intended. The Court said:

> Indeed, even the respondents seem to concede that, if §1982 "means what it says" — to use the words of the respondents' brief — then it must encompass every racially motivated refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. 392 U.S. at 421-22.

The second statement, stressing the argument set forth in petitionrs' brief, said:

> Hence the structure of the 1866 Act, as well as its language, points to the conclusion urged by the petitioners in this case — that §1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, ... 392 U.S. at 426.

[51]Similar expressions in other opinions in cases involving the 1866 civil rghts statutes are likewise *dicta* because motivation was not at issue in any of them; all involved blatantly discriminatory practices. *E.g.,* Buchanan v. Warley, 245 U.S. 60, 79, 81 91917); Civil Rights Case,

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racially inspired refusals to sell or rent by private — as opposed to public — entities, and the Court plainly was not making any judgments concerning the substantive scope of the statute beyond its inclusion of private discrimination. Finally, assuming that these phrases were truly *dicta*, i.e., a ruling (unnecessary to the decision in *Jones*) that purposeful discrimination is an essential element of § 1982, than that *dicta* should not be followed. This would not be the first time that the Court has rejected *dictum* regarding § 1982; in *Jones* itself, the Court declined to be bound by statements in *Hurd v. Hodge, supra* n.14, that § 1982 applies only to "governmental action". 392 U.S. at 419-20.

The phrases upon which petitiones rely are not much different from the words "because of race", which appear in both Title VII of the Civil Rights Act of 1964[52] and in Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act).[53] In *Griggs v. Duke Power Co., supra,* this Court made no mention of the phrase in concluding that, according to the plain statutory language, discriminatory impact was sufficient to constitute a violation of Title VII unless justified by business necessity; and the lower federal courts have uniformly concluded that a violation of the Fair Housing Act can be established by a showing of discriminatory effect, without proof of invidious motivation.[54]

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supra, 109 U.S. at 36 (Harlan, J., dissenting); Runyon v. McCrary, *supra,* 427 U.S. at 170-171; Sullivan v. Little Hunting Park, Inc., *supra,* 396 U.S. at 235.

[52]Sec. 703(a), 42 U.S.C. § 2000e-2(a).

[53]Sec. 804, 42 U.S.C. § 3604.

[54]Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, *supra* n.27; Smith v. Anchor Bldg. Corp. 536 F.2d 231 (8th Cir. 1976); United States v. City of Black Jac, 508 F.2d 1179, 1183 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970) (*dictum*), *cert. denied,* 401 U.S. 1010 (1971); Resident Advisory Bd. v. Rizzo, *supra* n.27, 564 F.2d at 146-48.

Section 1982, of course, contains no such language and flatly states that all persons shall be protected in the rights enumerated in the statute to the same extent as white citizens. We do not dispute that § 1982 encompasses "every racially motivated refusal to sell or rent", or that it was "meant to prohibit *all* racially motivated deprivations" of the statutorily protected rights, as this Court said in *Jones*. We contend that it reaches other activities which adversely affect blacks, as well. Nothing in this Court's prior cases prevent such a ruling.

III.

THE JUDGMENT BELOW MAY ALSO BE AFFIRMED UNDER 42 U.S.C. § 1983 BECAUSE PLAINTIFFS' EVIDENCE JUSTIFIED A FINDING OF INTENTIONAL DISCRIMINATION.

We do not concede that a finding of intentional discrimination is necessary to make out a violation of 42 U.S.C. § 1982. However, the judgment of the Court of Appeals in this matter may also be affirmed under 42 U.S.C. § 1983 and the Fourteenth Amendment, which require such a finding. The evidence in this case was more than adequate to justify such a finding. As we have previously pointed out, the district judge's contrary conclusion rested upon his misreading of the prior Court of Appeals opinion. *See* note 25 *supra*. Although the Court of Appeals' opinion follows a circuitous route, we believe that, taken as a whole, it indicates the Sixth Circuit majority's view that the district court erred in assessing plaintiffs' § 1983 claim.

After summarizing the pertinent portions of the trial judge's opinion, the Court of Appeals described the *two* errors in the district court's reasoning:

> While in his opinion, the trial judge expressly indicated his awareness of *Arlington Heights, supra,* we believe [1] that he conceived himself limited in his capability to grant relief [under § 1983] by the language in *Green I* and [2] that he placed too high a threshold upon the requirements of Section 1982 and, underlying it, the Thirteenth Amendment. (A. 180.)

The bracketed insertions, we suggest, clarify the intended meaning of the Court of Appeals' majority. They are the only interpretation of the passage which is consistent with the remainder of the opinion. For the Court of Appeals went on to address itself principally to the § 1982 issue:

> In short, we conclude that, upon his own findings and upon the proof credited by him, the pattern of discrimination here was indedd "stark" and was in a very real sense a badge of slavery violative of plaintiffs' rights under the Thirteenth Amendment and subject to relief under 42 U.S.C. § 1982.[8]
>
> [8]Because of our holding that the plaintiffs are entitled to relief under Section 1982, we do not reach the question whether relief could be predicated directly on the Thirteenth Amendment with the cause of action lying under Section 1983 . . . . (A. 180.)

The phrasing of footnote 8 in the majority opinion below is extremely significant: the Court of Appeals was pretermitting only the issue of a direct Thirteenth Amendment suit brought pursuant to the authorization contained in § 1983. The majority did not fail to "reach the question whether relief could be predicated directly on the [Fourteenth] Amendment with the cause of action lying under Section 1983." Following an extended discussion of the § 1982 violation, the majority stated in footnote 13 of its opinion, A. 186:

> We expressly leave open here the question to what extent intent is ever an element of the plaintiff's case under Section 1982. . . .

The only possible justification for not deciding this issue, given the attention paid to the question of "intent" in both the district court and Court of Appeals' opinions, is that the Sixth Circuit viewed the record as adequate to demonstrate intent, at least under § 1983. While a reversal on this ground might have been a clearer way of proceeding than the alternative § 1982 ground articulated by the Court of Appeals, the judgment below is proper on either basis.

The evidence discussed above at pp. - was clearly sufficient, under the standards of *Village of Arlington Heights v. Metropolitan Housing Dev. Corp., supra.* This is not a case, for example, where the only evidence relevant to the intent issue concerned foreseeability of impact. *See Columbus Bd. of Educ. v. Penick,* 443 U.S. 449, 464-65 (1979); *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 536 n.9 (1979). Rather, the "totality of the circumstances" deemed relevant in *Arlington Heights* supports the finding of discriminatory intent made by the Court of Appeals. *See City of Mobile v. bolden, supra,* 64 L. Ed. 2d at 81-82 (White, J., dissenting).

Indeed, the examples of evidence considered probative of discriminatory intent in *Arlington Heights, see* 429 U.S. at 267-68, were all present in this case:

> The impact of the official action — whether it "bears more heavily on one race than another," [citation omitted] may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. [Citations omitted.] The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact alone is not determinative, and the Court must look to other evidence.

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. [Citations omitted.] The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. [Citations omitted] . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

First, discriminatory effect was found by both the district court and the Sixth Circuit, and is not seriously contested. One may differ with the Court of Appeals' view of the degree to which the West Drive closing was a "stark" pattern; nevertheless, it is indisputable that the city chose to erect a barrier at the point of contact between black and white communities, rather than at some other intersection along the street in a manner which would reduce through traffic but not carry the symbolic message of an obstruction along Jackson Avenue. *Second,* the historical context is one which is highly suggestive of discriminatory intent, as the district judge recognized (*see* note 20 *supra*). It commenced with the historic antipathy to the presence of blacks in either the Hein Park subdivision or the Overton Park recreational facilities. *See Watson v. City of Memphis,* 303 F.2d 863, 865 (6th Cir. 1962), *rev'd* 373 U.S. 526 (1963). Plaintiff Greene testified, without contradiction, that historically black persons had been beaten "because of being in that neighborhood after dark." Tr. 37. It culminated in a series of efforts by the white residents of the subdivision "to stop these [black] people to the north" (A. 124). *Third,* the specific sequence of events leading up to the street closure gave adequate notice to city officials that the plan was insulting

and degrading to black citizens who would be excluded from traversing West Drive. One witness testified that "they don't want the black people in there, no way. That's the way it is" (Exh. 26, pp. 35-36). A white resident told the Council point blank that "[t]hat, Mr. Chairman, [the "niggers"] is the issue here" (Exh. 30, at 1). *Fourth,* the procedure was marked by both procedural and substantive departures from normal processes. For example, the Planning Commission acted hastily, in advance of the public meeting it had itself scheduled on the matter and without hearing from a major city department. Although the policy of the city generally was to avoid the creation of long streets without intersections, and although questions about the legality of the proposed street closures had earlier been raised, these concerns were swept aside in early 1974 when the Council passed on the West Drive matter.

Taken together, as the Sixth Circuit recognized, these factors left little doubt that the district judge would have found intent if he had not felt it necessary, under the prior mandate of the Court of Appeals, to have a comparison refusal to close a street upon request in a black neighborhood. *See* note 25 *supra*. Rather than send the issue back to the trial judge for reconsideration, the Court of Appeals elected to decide the alternative § 1982 question. Because its view of the record as supporting an "intent" finding was correct, however, the judgment below should be affirmed.[55]

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[55]Alternatively, the matter should be remanded to the trial court for reconsideration of the "intent" issue free from the restraints of the Court of Appeals' first remand opinion.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDICES

Appendix A

The Fourteenth Amendment to the Constitution provides as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective number, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an

officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983 provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Appendix B

The complete provisions of the Virginia Act of January 15, 1866, "An Act Providing for the Punishment of Vagrants", are:

1. *Be it enacted by the general assembly,* That the overseers of the poor, or other officers having charge of the poor, or the special county police, or the police of any corporation, or any one or more of such persons, shall be, and are hereby, empowered and required, on discovering any vagrant or vagrants within their respective counties or corporations, to make information thereof to any justice of the peace of their county or corporation, and to require a warrant for apprehending such vagrant or vagrants, to be brought before him or some other justice; and if upon due examination it shall appear that the person or persons are within the true description of a vagrant, as hereinafter mentioned, such justice shall, by warrant, order such vagrant or vagrants to be employed in labor for any term not exceeding three months, and by any constable of such county or corporation to be hired out for the best wages that can be procured; to be applied, except as hereafter provided, for the use of the vagrant or his family, as ordered by the justice. And if any such vagrant or vagrants shall, during such time of service, without sufficient cause, run away from the person so employing him or them, he or they shall be apprehended on the warrant of a justice, and returned to the custody of such hirer, who shall have, free of any further hire, the services of such vagrant for one month in addition to the original term of hiring; and said employer shall then have the power, if authorized by the justice, to work said vagrant confined with ball and chain; or should said hirer decline again to receive said vagrant, then said vagrant shall be taken by the officer, upon the order of the justice, to the poor or work house, if there be any such in said county or corpora-

tion; or, if authorized by the justice, to work him confined with ball and chain for the period for which he would have had to serve his late employer, had he consented to receive him again; or should there be, when said runaway vagrant is apprehended, any public work going on in said county or corporation, then said vagrant, upon the order of a justice, shall be delivered over by said officer to the superintendent of said public work, who shall, for the like last-mentioned period, work said vagrant on said public works, confined with ball and chain, if so authorized by said justice. But if there be no poor or work house in said county or corporation, and no public work then in progress therein, then, in that event, said justice may cause said vagrant to be delivered to any person who will take charge of him, said person to have his services free of charge, except maintenance, for a like last-mentioned period; and said person so receiving said vagrant is hereby empowered, if authorized by the justice, to work said vagrant with ball and chain; or should no such person be found, then said vagrant is to be committed to the county jail, there to be confined for the like period and fed on bread and water. But the persons described as the fifth class of vagrants in the second section of this act, may be arrested without warrant by the special county or corporation police, and when so arrested shall be taken before a justice, who shall proceed to dispose of them in the mode prescribed in this section, or may at once direct them to be committed to prison for a period not exceeding three months, to be kept in close confinement and fed on bread and water.

2. The following described persons shall be liable to the penalties imposed by law upon vagrants:

Frist. All persons who shall unlawfully return into any county or corporation whence they have been legally removed.

Second. All person [*sic*] not having wherewith to maintain themselves and their families, who live idly and without employment, and refuse to work for the usual and common wages given to other laborers, in the like work, in the place where they then are.

Third. All persons who shall refuse to perform the work allotted to them by the overseers of the poor, as aforesaid.

Fourth. All persons going about from door to door, or placing themselves in streets, highways, or other roads to beg alms; and all other persons wandering abroad and begging, unless disabled or incapable of labor.

Fifth. All persons who shall come from any place without this commonwealth to any place within it, and shall be found loitering and residing therein, and shall follow no trade, labor, occupation or business, and have no visible means of subsistence, and give no reasonable account of themselves or their business in such place.

3. All costs and expenses incurred shall be paid out of the hire of such vagrant, if sufficient; and if not sufficient, the deficiency shall be paid by the county or corporation.

4. This act shall be in force from its passage.

Passed January 15, 1866

1 S. EXEC. DOC. NO. 6, 39th Cong., 2nd Sess., 229-30 (1866).

Appendix C

Terry's order reads in pertinent part:

In many counties of this State meetings of employers have been held, and unjust and wrongful combinations have been entered into for the purpose of depressing the wages of the freedmen below the real value of their labor, far below the prices formerly paid to masters for labor performed by their slaves. By reason of these combinations wages utterly inadequate to the support of themselves and families have, in many places, become the usual and common wages of the freedmen. The effect of the statute in question will be, therefore, to compel the freedmen, under penalty of punishment as criminals, to accept and labor for the wages established by these combinations of employers. It places them wholly in the power of their employers, and it is easy to foresee that, even where no such combination now exists, the temptation to form them offered by the statute will be too strong to be resisted, and that such inadequate wages will become the common and usual wages throughout the State. The ultimate effect of the statute will be to reduce the freedmen to a condition of servitude worse than that from which they have been emancipated — A condition which will be slavery in all but its name.

It is therefore ordered that no magistrate, civil officer or other person shall in any way or manner apply or attempt to apply the provisions of said statute to any colored person in this department.

By command of Major General A.H. Terry,
Ed. W. Smith, *Assistant Adjutant General.*